United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

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76-1495

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United States Court of Appeals
For the Second Circuit

UNITED STATES OF AMERICA,

Appellee,

-against-

EUGENE SCAFIDI,

Appellant.

On Appeal From The United States District Court
For The Eastern District Of New York

APPELLANT'S BRIEF

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UNITED STATES COURT OF APPEALS
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UNITED STATES OF AMERICA,

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- against -

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Appellant

BRIEF FOR THE APPELLANT
EUGENE SCAFIDI:

PRELIMINARY STATEMENT:

This is an appeal taken by EUGENE SCAFIDI, from a judgment of conviction had in the United States District Court, Eastern District of New York before a judge and jury (Chief Judge Jacob Mishler) for violating 18 U.S.C 1955 and 2.

As a consequence, the appellant EUGENE SCAFIFI was sentenced to a term of three (3) years, under 18 U.S.C. 3651, two months of which were to be served in jail and 34 months, the balance of the term remaining, to be served on probation.

STATEMENT OF ISSUES
PRESENTED FOR REVIEW:

Did the government establish the appellant's guilt beyond a reasonable doubt?

STATEMENT OF THE CASE AGAINST EUGENE SCAFIDI

(A) INTRODUCTION

This was a gambling case. The form of gambling was policy or lottery in violation of Article 225 of the Penal Law of the State of New York. That Article contains various sections relating to "lottery" and the possession of records or paraphernalia used in connection with the maintenance of the enterprise. Lottery also can relate to "policy" or the numbers game. This is a form of lottery; see Section 255.00 (10)(11).

The surviving count of the indictment insofar as the appellant is involved, was the first count of the redacted indictment and fixed the occurrences as being from on or about March 1972 to July 1972. These occurrences occurred at certain premises or the vicinity thereof, designated as 967 East 2nd Street, Brooklyn, New York. Observations were made of these premises on the dates hereinafter enumerated by various federal agents. The observations consisted of seeing the defendant driving past the premises and, on one occasion, entering or leaving the premises. The defendant was also seen in the company of the co-defendants named in the said first count. The government did not prove that the defendant was carrying

the usual "brown bag" or other receptacle, symbolizing the "hallmark" of the policy courier or pick up man. Nor did the government establish or show that the appellant wrote on the slips or paraphernalia, handled them, or received, paid out or handled any money whatsoever.

In regard to this count, there was no electronic surveillance involving the appellant or the premises and the appellant's voice was not "seized" electronically.

THE FACTS:

Hendrickson, a federal agent, testified that premises 967 East 2nd Street, Brooklyn, New York, was occupied by a Viola Nordstrom (415).* This was May 1972. He described an alleyway (or driveway) adjoining the premises (416). No photographs of this house were taken (416). On May 1, 1972 he was in the company of other agents. They entered the premises to execute a search warrant, seized adding machines and paraphernalia at those premises (416, 417). It was not claimed that the appellant wrote on the papers or paraphernalia or used the machines, (417). Furthermore, the items described were common items and were obtainable anywhere (417). Viola Nordstrom told him she worked for a stock broker (418). Six agents raided the premises. The appellant was not arrested, (419).

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*( )This refers to the page number of the stenographic transcript of the trial.

Charles Queener, another federal agent investigating this case, testified that on April 12, 1972 he had 967 East 2nd Street under surveillance (528). He placed the premises being in Brooklyn at Elmore and East 2nd Street. He saw two co-defendants park an automobile near those premises (528). On April 14,1972 he saw a co-defendant named Vullo and Mustachio enter the premises within minutes of each other (529). Later in the evening he saw the appellant Scafidi using the driveway adjoining the premises (529). He also saw a person known to him as Buddy Griffin there, (530).

On April 17, 1972 Queener saw Griffin and Vuolo enter; April 19, 1972 he saw Vuolo enter the premises in the evening and a co-defendant named Mustachio also entered at a separate time. Finally at two minutes after ten he observed the appellant walking down the driveway adjoining the house (530, 531).

On May 1, 1972 the agents executed the search warrant at the premises. Upon entering they found Griffin, Vuolo and Mustachio in the basement (534). Later that evening the appellant was in the basement (534). He described premises 967 East 2nd Street as being in the Flatbush area of Brooklyn, a two story house and basement, a driveway to the left (574, 575). However this agent did not know where the driveway led to nor did he ever see the rear of the premises (575).

Queener described the area as consisting of two family or private houses (576). It was described as a residential rather than commercial area. There were no apartment houses (576, 577).

On May 1, 1972 when the search warrant was executed at the premises, when this witness entered the premises, the appellant was not there (577, 578). Two agents remained outside the premises. Later that day he saw the appellant. He never asked the appellant how he entered the premises (579, 580). Nor were photographs taken of the premises (580).

Edward Lahey, another federal agent, testified (892). On May 18, 1972 he saw the appellant at Howard Beach, Queens, New York, around midnight (982). He observed the appellant drive away and he followed the appellant's car (983, 984).

Prior thereto on May 1, 1972 he executed a search warrant naming the defendant and his car as the subjects (984). This was outside the premises at 967 East 2nd Street (986). Prior to the execution of the search warrant the appellant while driving his car, was stopped by the agents (986). He described this as arising from the appellant initially stopping his car at the premises and then starting it again (987, 988). The agents then directed him to stop the car (988). This witness searched the appellant's car

and found nothing (990). Two agents then escorted the appellant into the premises 967 East 2nd Street (990, 991). The appellant was not arrested (991).

On May 19, 1972 he followed the appellant in his car to Brooklyn from Howard Beach (993, 994). The appellant stopped his car at Brooklyn and Foster Avenues in Brooklyn (996,997). He described the area as consisting of apartment houses (998). At this juncture the appellant spoke to two or three people (999). The agent didn't know the people. He saw nothing given to them by the appellant (999, 1000).

He identified Martin Griffin as a boyfriend of the woman who occupied the premises at 967 East 2nd Street (1027, 1028).

Swint, another agent testified (1117). He participated in a search of the premises at 967 East 2nd Street, Brooklyn, on May 1, 1972 (1125). Upon entering the premises he saw Griffin, Mustachio and Vuolo (1126). He admitted that the appellant's presence at East 2nd Street was not voluntary. That is he was taken into the house by the agents when his car was stopped (1134, 1335).

On April 17, 1972 this witness saw Vuolo and Mustachio enter the premises at East 2nd Street (1161, 1162). He also saw the appellant driving a Chevelle and proceed to the driveway adjoining the house. However he never saw the appellant go into that house on East 2nd Street (1164, 1242).

The witness described the driveway as going from East 2nd Street to East 3rd Street and to be used to proceed to other houses (1242, 1243).

A former agent who was part of the investigators named Liesgang also testified (1836, 1838). On March 23, 1972 he conducted a surveillance between the hours of 7 to 9 P.M. in the Howard Beach area of Queens, specifically premises 164-26 86th Street (1839, 1840).

On April 18, 1972 he observed the premises at East 2nd Street (1841). He saw a co-defendant drive and enter; later at 11:00 P.M. he saw the appellant enter those premises (1841).

On April 19, 1972 he saw the appellant enter those premises again (1842). On April 25, 1972 he saw Vuolo enter the premises at East 2nd Street (1844).

A few days before, namely April 14, 1972, at about 11:00 P.M. he saw what appeared to be the appellant drive away from the premises at East 2nd Street (1871).

Liesgang also admitted that the appellant had a family relationship to Griffin (1953).

Questioned about the premises at East 2nd Street, he admitted that these premises were part of a small row of homes. The driveway or alleyway was to the left of the premises (1954, 1955).

The driveway went right through the block (1955). The driveway was open and could be used by the public (1955). There were garages to the rear of the houses (1956).

On April 14, 1972 he saw a person that "resembled the appellant" (1975). That person traversed the driveway alone (1975).

Liesgang was dressed inconspicuously wearing casual clothes. He made observations in the evening alone. According to him he tried to "blend" in the environment (1976, 1977).

At that time he saw the appellant enter the rear of the premises at East 2nd Street (1978, 1979). He then changed his testimony and stated he saw the appellant leaving the premises (1979). He was on the driveway when he observed the appellant. Questioned further he stated that he pretended to be taking a casual stroll (1980).

However when he observed the appellant, the appellant was not carrying anything (1981, 1982).

On April 18, 1972 he saw the appellant enter those premises at East 2nd Street. On April 19, 1972 he saw him leave (1981, 1982). This is set down to show that it is contrary to his prior testimony (1982). When he made the observations of the person he said was the appellant he was 40 to 50 feet away (1983).

This was in the evening (1983, 1984).

When he observed the appellant, the appellant was not carrying a "brown" paper bag (1984). Nor did he see the appellant do anything at the premises (1984).

Parsons, another agent, testified that he was part of the investigation of this case from March 31, 1971 to April 4, 1974. He never saw the appellant handling any money (2193). However he may have seen the appellant carrying a "bag" (2193). That event, if it occurred, would be in his "log" (2193). There were two Griffins in this case, Martin and Junior; Martin Griffin, Jr. was dead (2200). But he knew that Scafidi was related to the Griffins (2200, 2201). That relationship was innocent (2201). He also admitted that the appellant lived close to the Griffins in the Howard Beach area of Queens (2201).

A New York City police officer named O'Conner next testified (4408). In June 1971 he had premises 405 Elders Lane in Brooklyn under observation. He saw the appellant, Martin Griffin, Jr. and Vuolo enter. He new that Griffin died in 1972 (4409). They all went into the premises and proceeded to the second floor and then returned to the first floor (4410). He procured a search warrant to search those premises (4410).

Having a search warrant, along with other police officers, they executed it at those premises (4411). This was June 16, 1971 (4410, 4411). On the second floor of the premises this witness saw Vuolo, the appellant and Martin Griffin, Jr. in a small room (4411). When the police first appeared, Vuolo was carrying away a black briefcase which he dropped when he found out that the police were there (4411). This witness observed the appellant standing by a table in the room. The table had policy slips and $2,013 cash on it (4412). The police seized the slips (4412). There also was in the room adding machines, a computer and a copying machine (4413).

On cross examination this witness stated that the money was in the New York City Police Property Clerk's Office (4415). On June 11, 1971 he saw the appellant leave the house but not enter it (4418). On June 14, 1971 he saw the appellant enter the house and then exit (4418). On this occasion he saw the appellant go to the second floor with Vuolo and Griffin (4420).

O'Conner claimed that the appellant had a key to the premises. However when the appellant was searched he couldn't remember whether he seized a key to the premises from the appellant. Nor did a police inventory of the search disclose a key (4421, 4422 Defendant's Exhibit 2 for identification). He never saw the appellant carrying anything (4423). Nor did he ever see the appellant handle or write on any slips (4425).

In regard to the money, Scafidi disclaimed having anything to do with it. He never saw the appellant handle any money or slips or write (4424, 4425, 4427).

POINT I:

THE APPELLANT'S GUILT WAS NOT ESTABLISHED BEYOND A REASONABLE DOUBT, BECAUSE THERE WAS NO PROOF THAT THE APPELLANT VIOLATED THE RELEVANT NEW YORK STATE STATUTES IN ARTICLE 225 OF THE PENAL LAW OF THE STATE OF NEW YORK, WHICH WERE AN ELEMENT OF 18 U.S.C. 1955, SUCH NEW YORK STATE STATUTES RELATING TO THE ILLEGAL FORM OF GAMBLING KNOWN AS LOTTERY OR POLICY:

18 U.S.C. 1955 extended the reach of the federal government to suppress illegal gambling. See U.S. v. Becker, 461 F. 2d 230, (Cir. 2d, 1972); U.S. v. Fino, 478 F. 2d 35 (Cir. 2d, 1973); Iannelli v. U.S., 420 U.S. 770 (1975). Section 1955 can be conceptualized so that there are two categories contained in the statute. The first relates to the minimum amount of five persons who comprise the business in the defined capacity stated in the statute; the 30 days or more duration of the business, or the gross intake of the business of at least $2,000 in any day. It is suggested that these categories manifest the federal interest in the illegal gambling business. The second category is contained in the statutory assertion relating to what illegal gambling is. The statute thus provides that the business, to be illegal, must violate the law of the relevant state. In this case the state is New York.

In the interest of clarity therefore, this brings us to the relevant New York State statutes. Article 225.00 of the revised Penal Law of the State of New York, in effect from September 1, 1967 integrates the New York State laws relating to illegal gambling.

The basic question therefore is whether the appellant's conduct came within the relevant New York State statutes. The New York State statute as in the federal statutes relates to the professional gambler not the casual player. The form of gambling under consideration is defined as lottery or policy schemes or an enterprise; see Section 225.00 (10)(11).

Notwithstanding the revision of the Penal Law it is submitted that it has absorbed the prior case law of New York State under the prior New York State statutes relating to policy. In People v. Wollosky, 296 N.Y. 236 it was stated that there were four kinds of actions that came within the ban against illegal policy. They were maintaining a place where to play the policy, having ownership or control of such a locale, handling money involved, or possessing papers, writings or articles usually used in conducting this form of illegal gambling.

Under the statutes in effect since 1967 and relevant to this case, it is provided that having a connection with illegal

policy can be a felony or a misdemeanor. Thus when an accused receives in connection with the lottery enterprise money or written records from an intermediary or more than $500.00 in any one day of money played in the enterprise, such actions constitute a felony. See Section 225.10(2) of the revised Penal Law which defines the felony as a Class E Felony and is designated as promoting gambling in the first degree.

Under Section 225.05 of the Penal Law, the acts such as advancing or profiting from unlawful gambling activity constitute a Class A Misdemeanor. This is known as promoting gambling in the second degree. The advancement of gambling as defined in the revised Penal Law means that the accused acts other than a player and engages in conduct which materially aids form of gambling activity such as creating or establishing the game, acquiring or maintaining the premises, paraphernalia or equipment or apparatus used, or soliciting or inducing persons to participate or participating in the financial or recording phases of the enterprise; see Section 225.00 (4) of the Penal Law.

The next group of gambling offenses relating to lottery are possessory offenses. The distinction of these crimes is based upon the seriousness of the offense. The more serious of the offense is a Class E Felony, and the less serious is a Class A Misdemeanor. The distinctions are based on the number and amount of records involved and the records themselves are referred to any "writing, paper, instrument or article" and then

are further characterized in those sections relating to the degrees of the crime. Thus possession of gambling records in the first degree, a Class E Felony under Section 225.20(2), relate to the material "commonly used in lottery or policy schemes, constituting, representing or reflecting more than 500 chances or plays" ; see Section 225.20 of the Penal Law. Possession of gambling records as a misdeamonor or in the second degree relates to possession of any "writing", "paper","instrument" or "article" relating to the type "commonly used in the lottery or policy scheme". It is submitted that there was no showing beyond any reasonable doubt that Scafidi promoted gambling, advanced gambling or possessed the materials forbidden by the New York State statutes. Nor is there any showing that the appellant engaged in any conduct which "materially" aided the maintenance of the illegal business. As enumerated above in the statement of facts, the prosecution here did not show that Scafidi created or established the game, acquired or maintained the premises, had any paraphernalia or equipment or any other apparatus used, solicited or induced persons to participate or participated in the financial or recording phases of the business. See Section 225.00 (4) of the Penal Law of the State of New York.

Thus, as to the possessive aspects of the business, it is the law of the State of New York that since mere possession without more constitutes the offense, the prosecution must establish that the accused's possession be conclusively shown; see People v. West, unofficially reported in 237 N.Y.S. 2d 978. In People v. Mitchell, unofficially reported in 237 N.Y.S. 2d 775 it appeared that the defendant there occupied an apartment in which the incriminating paraphernalia was found and that there were others also in the apartment whose possession was not excluded, it was held that the element of possession was not established.

So also in People v. Wolosky, 296 N.Y. 236 (supra) the proof showed that the defendant inscribed policy wagers on a marble slab that was an integral part of the building. Because there was no showing that the defendant was an owner or tenant of the building, or had any control or management over it, the defendant was acquitted, it being held that the evidence failed to establish that the defendant had "possession" of the paraphernalia or the writing.

In People v. Lunsford, 46 A.D. 2d 612, 359 N.Y.S. 2d 676, at page 678, conviction for the possession of gambling records

were reversed. It was stated by the Court in part that:

> "...The proof adduced at the trial was not sufficient to demonstrate beyond a reasonable doubt that the defendants possessed or received the gambling records. The defendants were neither the subjects nor the objects of the search warrant; hence the circumstantial evidence of mere presence in the apartment was inadequate to sustain the People's claim of constructive possession. The People made no attempt to prove who the lessee of the apartment was, and the fact that the defendants were merely present in the apartment at the time the warrant was executed was clearly inadequate to show that the defendants exercised such control over the premises that they deemed to be in constructive possession of the contraband found..." (Internal quotations and citations omitted).
>
> "The circumstantial proof concerning receipt of the gambling records, necessary to sustain a conviction promoting gambling in the first degree, is derived solely from the circumstantial evidence of possession. ... The inference that the defendants received the gambling records was supported only by the circumstantial evidence tending to show possession. And, as indicated above, the evidence was insufficient to prove possession beyond a reasonable doubt." (Internal quotations omitted).

The evidence under the first count of the indictment did not show that the defendant was carrying paraphernalia, handled paraphernalia, consorted with the others to promote the game, maintained an interest in the premises at East 2nd Street,or even entered the premises to carry on the illegal enterprise.

The mere fact that the defendant even went to the premises on other occasions or even intended to go in on that occasion, did not establish that the defendant was anything more than a mere bystander.

Presence, it is suggested, near the scene of a crime without more does not make a person a participant in the crime either as a principal or as accomplice or an accessory.

In U.S. v. Johnson, 513 F. 2d 819, (Cir. 2d, 1975), there were two youths. One was named Loewe and the other Johnson. They were indicted for importing drugs into the United States under the substantive counts of the indictment, and also charged with a conspiracy. Johnson went to trial. This court had before it facts which disclosed that both defendants were close friends, that Johnson at the time in question visited Loewe at his home to give Loewe's parents a Christmas gift but that Loewe's parents were not there to receive it. Subsequently Loewe and Johnson went to Canada, staying at a motel there. When Johnson was asleep, Loewe left the room and procured the drugs from a supplier and then concealed the drugs in the panel of a door in the passenger side of his car.

Ultimately, Loewe joined Johnson and they went on a drinking and eating tour in Canada inquiring as to the availability of motorcycle parts. They then drove to the United

States, Loewe being the driver of the car. Crossing the border, a customs agent asked them the purpose of the trip and was told that the purpose was to buy motorcycle parts. However, Johnson seemed "nervous" to the customs agent which caused the agent to make a secondary search. This search was successful as the agent retrieved the drugs. Nevertheless this Court reversed the conviction as to Johnson it being noted that both defendants were close friends and that Johnson knew that Loewe at that time was on probation from a state court. It was further found by this Court that Johnson also knew that the co-defendant was not allowed to leave the United States. That Johnson made false statements to the customs agent in an attempt to get himself out of the difficulties, this Court stated on page 823 that:

> "...It is well established, however, that in order to be an aider and abettor a defendant must associate himself with the venture in some fashion, participate in it as something that he wishes to bring about or seek by his action to make it succeed. ..." (Omitting internal quotations and citations).

Since 1955 contains the element of a conspiracy as well as the elements of aiding and abetting which are substantive, it is instructive to again borrow the holding of this Court on page 823 of that case. Thus it was stated that:

> "...There is not an iota of evidence to connect Johnson with Loewe's acquisition, concealment, importation, use and sale of... No drugs were found on Johnson, nor was his fingerprints on the plastic bag containing the ...(drugs) or in any location that would indicate that he had helped to secrete them in the passenger door of...car... Nor was there any showing that Johnson had ever used or sold drugs, provided Loewe with money that could be used for their purchase or had acted as a leader or lookout for him. ..."

Continuing this Court stated on pages 823-824 that:

> "Absent evidence of such purposeful behavior, mere presence at the scene of a crime, even when coupled with knowledge that at that moment a crime is being committed, is insufficient to prove aiding or abetting or membership in a conspiracy. Guilt may not be inferred from mere association with a guilty party..." (Omitting citations).

Furthermore, this Court can in reviewing the evidence, consider it was "ambiguous". See U.S. v. Robinson, Court of Appeals, Second Circuit, slip opinion November 1, 1976, page 6913 at page 6917.

Thus, because Scafidi may have been present in or about the premises at 967 East 2nd Street not only on May 1, 1972 but on prior occasions, does not support the conviction herein.

In the statement of facts, counsel has stated that an agent may have seen on one occasion Scafidi entering and leaving the premises (1841, 1842, 1978, 1979).

It must be emphasized that there was no showing that the defendant in entering the premises was carrying anything. That in leaving the premises the defendant was carrying anything. Furthermore, where in the premises the defendant went was not established; what the defendant did in the premises was not established.

In U.S. v. Febre, 425 F. 2d 107, (Cir. 2d, 1970) cert. denied, 400 U.S. 849, at page 111 this Court reversed a conviction where the element of proof, namely "possession" was not established. In Febre, "possession" was a cardinal element of the evidence in the case because that case dealt with knowledge that illegally trafficked heroin was illegally imported into the United States. The "possession" would give rise in that case to an inference of knowledge. Yet on page 111 this Court in part stated that:

> "...Febre's only intenuous and tenuous connection with this sample was that he was seen emerging from an apartment building with Pego when Pego was on his way to deliver the sample to Cook. Since his entry into the apartment building apparently preceded that of Pego..., Febre cannot be charged with personally having transported the sample to the apartment at Pego's request. Even if the jury had concluded that Febre and Pego had been in the same apartment, it had no way of knowing whether Febre actually handed the sample over to Pego, whether someone else who had been in the apartment did so, whether Pego obtained the sample himself from the stock of heroin he knew to be in the apartment or somewhere else in the building, or whether Pego had the sample in his possession, when he had spoken with Cook earlier and had returned to the apartment only to inform the others who

> who may have been involved in the conspiracy of his arrangement with Cook. The inferences required to support a finding of actual possession on this count rest on two slender a reed. There was also no evidence whatsoever to suggest that Febre had actually possessed...heroin which Pego transported to Cook... and which formed the basis for count Four."
>
> "...; a showing of constructive possession through the exercise of dominion and control over narcotics will also suffice... We also set forth several indicia of constructive possession: properly admitted evidence showing that a given defendant set the price..., had the final say as to means of transfer, or was able to assure delivery, may well be sufficient to charge the defendant with a constructive possession."

There was also evidence that the defendant was related to Vuolo and to Griffin (1953, 2200, 2201). Furthermore, the evidence is clear that the appellant lived close to the Griffins and to Vuolo at Howard Beach (2201). Thus, the appellant also lived about four (4) blocks away from Vuolo (5731).

Since Section 1955 is a group crime, it is conceptually related to a conspiracy even though the crime under Section 1955 and conspiracy are separate offenses. Nevertheless, it would seem that the holding in U.S. v. DiRe, 332 U.S. 581 is applicable. A conspiracy is not established from a mere group of people. As stated on page 593:

"Presumptions of guilt are not likely to be indulged in from mere meanings..."

Another salient part of the statute, Section 1955, that was not established, was that the appellant did not "conduct" the illegal gambling enterprise in conjunction with the others or by himself. In U.S. v. Becker, 461 F. 2d 230 (Cir. 2d, 1972) this Court held that Section 1955 did not define the term "conduct". However, this Court after examining the legislative history of that term contained in 18 U.S.C. 1511 held that the legislative intent was to include all those who particpate in the operation of a gambling business whether such persons were agents, runners, independent contractors or the like and that the intent of the statute was to exclude the players.

But nowhere in regard to count 1 of the indictment was Scafidi shown to have any sinister role in the"conduct" of the business. Aside from the fact there was no possession of paraphernalia, there was also no showing that Scafidi was a collector or a runner or that he had any contact with the business described in count 1 of the indictment for the period of March 1972 to July 1972.

It is put that the broad reach of Section 1955 does not supply proof of guilt where there is no evidence to support the guilt.

Convictions have been vacated when they were so totally devoid of evidentiary support as to become violative of due process of law under the 5th Amendment to the Federal Constitution. See Garner v. Louisiana, 368 U.S. 157 (1961); Thompson v. Louisville, 362 U.S. 199 (1960) and Johnson v. Florida, 391 U.S., 1968.

In Vachon v. New Hampshire, 414 U.S. 478 (1974) the accused before a state court was charged with wilfully distributing to the delinquincy of a 14 year old girl who purchased a button describing various sexual diversions at a store owned by the accused. The accused admitted he controlled the premises at the time of the sale. The proof was to the effect that the accused did not actually make the sale to the minor. It was held that the evidence was insufficient to establish that the accused personally sold the girl the offensive article knowing her to be a minor or personally caused another to sell it to her. The Court concluded the conviction was violative of due process of law.

It may be recalled that a New York City police officer named O'Conner testified that in June 1971 he observed premises 405 Elders Lane in Brooklyn. He saw the defendants Griffin and Vuolo enter those premises at various times in June 1971. Ultimately on June 16, 1971 on the second floor he saw Vuolo, the defendant and Griffin. The defendant was placed near a table which of course contained lottery paraphernalia (4410,

4411, 4412).

Apparently the theory of admitting this into evidence was to show similar prior occurrences.

Such evidence of course is admitted but not for the purpose of showing that the accused's character or disposition is criminal. See U.S. v. Grady, Court of Appeals, Second Circuit, slip opinion October 27, 1976, at page 291 and page 302. See also U.S. Deaton, 381 F. 2d 114, 117 (Cir. 2d, 1967).

Rule 404 of the Federal Rules of Evidence provides in subdivision (3)(b) that:

> "Other Crimes, Wrongs or Acts. Evidence of other crimes, wrongs or acts, is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may however be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident."

Firstly, these events occurred one year prior to the indictment dates. Secondly, this incident would go more to the second count of the redacted indictment than the first count. The second count involved telephone conversations between the defendant and others. Consequently, such evidence would explain away any claim by the defendant that his conversations were innocent and were related to non-sinister activities.

Lastly, it is brought to this Court's attention that the first count of the redacted indictment which is the concern here, named four participants in the illegal enterprise adding the usual allegation that"there were persons known and unknown to the grand jury" who were part of the enterprise. It appears that two of the named defendants D'Avanzo and Annarumo, were acquitted. That leaves two known participants, the appellant and the co-defendant Vuolo,plus persons "known and unknown to the grand jury". It is respectfully submitted that there is a serious doubt as to the number of persons participating in the enterprise. In other words, there is a scarcity of evidence that there were three persons known and unknown to the grand jury. Three would be necessary because of the acquittal of two of the named participants.

Furthermore, it would seem that Scafidi's role, if any, does not bring him into the orbit of the five persons or more conducting the enterprise.

In U.S. v. Tarter, 522 F. 2d 520 (Cir. 6th, 1975), at page 526 it was stated in part that:

"...it appears from its use of the term gambling business as an element of the offense that Congress intended to assert jurisdiction only over established commercial enterprises in which five or more persons have a financial interest and who are active in its operation... Accordingly, although we agree that the five participants necessary to permit the assertion of federal jurisdiction may include street-level employees, ..., in addition to high-level management personnel..., nevertheless we observe that there still must be at least five persons who are active in its operation and share an interest in the success of the venture. The critical five persons may work together in different relationships...,..." (Omitting internal quotations and citations).

POINT II:

THE APPELLANT EUGENE SCAFIDI PURSUANT TO RULE 28(i) OF THE FEDERAL RULES OF APPELLATE PROCEDURE, RESPECTFULLY ADOPTS ALL POINTS ADVANCED BY THE CO-APPELLANTS IN THIS CASE INSOFAR AS THOSE POINTS ARE APPLICABLE TO THE APPELLANT'S APPEAL.

CONCLUSION:

IT IS RESPECTFULLY SUBMITTED THAT THE JUDGMENT OF CONVICTION APPEALED FROM SHOULD BE REVERSED.

Respectfully submitted,

ARNOLD E. WALLACH
Attorney for Appellant
EUGENE SCAFIFI

WALLACH

STATE OF NEW YORK)
: SS.
COUNTY OF RICHMOND)

ROBERT BAILEY, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N. Y. 10302. That on the 8 day of ~~Jan.~~ Feb. 1977 deponent served the within Brief upon

Michael E. Moore, Esq.
c/o George Gilinsky, Esq.
and
U.S. Atty.
Fred S. Barlow, Esq.
attorney(s) for

Appellee

in this action, at

P.O. Box 899, Benjamin Franklin Station, Washington, D.C. 20044 and
35 Tillary St., Brooklyn, NY 11201

the address(es) designated by said attorney(s) for that purpose by depositing 1 copies of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custod of the United States post office department within the State of New York.

ROBERT BAILEY

Sworn to before me, this 8 day
of Feb. , 1977

WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1978